THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 829/11

In the matter between:

FIRSTRAND BANK LIMITED **APPELLANT**

and

SIEGFRIED VENTER **RESPONDENT**

Neutral citation: *Firstrand Bank v Venter* (829/11) [2012] ZASCA 117 (14 September 2012)

Coram: HEHER, SHONGWE, LEACH, WALLIS AND PETSE JJA

Heard: 17 August 2012

Delivered: 14 September 2012

Updated:

Summary: Bank – overdrawn current account – proof of – application of s 15 of the Electronic Communications and Transactions Act 25 of 2002.
Evidence – admission of fact in claim in convention – same denied in plea to claim in reconvention – effect – proper approach of court – s 15 of Civil Proceedings Evidence Act 1965.
Defamation – injuria – dishonour of cheques – liability of bank.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ebersohn and Vilakazi AJJ sitting as court of appeal):

1. The appeal by the Bank in relation to the claim and counterclaims is upheld with costs.

2. The order of the court a quo is set aside and in its place the following order is made:

'The appeal is dismissed with costs.'

JUDGMENT

HEHER JA (SHONGWE, LEACH, WALLIS AND PETSE JJA concurring):

[1] The appellant ('the Bank') sued the respondent, a farmer, ('Mr Venter') in the magistrate's court for the district of Potgietersrus for payment of R37 549,67, being the balance of an overdrawn current account together with interest at the prime rate plus four per cent from 15 May 2004 to date of payment. The rate of interest was alleged to be the expressly or tacitly agreed rate or one arrived at on the basis of bank practice.

[2] The respondent resisted the claim. He pleaded a breach of contract 'analogous to fictional fulfilment', a defence not seriously pursued at the trial or subsequently. He also denied the terms of the agreement relied on by the Bank, pleading specifically that the agreed rate of interest on the overdraft facility was one and a half per cent per annum above prime.

[3] The respondent raised six counterclaims arising from the dishonour of three cheques. He claimed damages for defamation (in claims 1, 3 and 5) and for injury to his dignity (in claims 2, 4 and 6). Claims 1 and 2 related to a cheque for R10 000 drawn by him in favour of S van der Bank on 25 March 2003; claims 3 and 4 related to a

cheque for R15 000 drawn by him in favour of Novon Janwurm dated 7 April 2003; and claims 5 and 6 related to a cheque for R30 000 alleged to have been drawn by him in favour of the same creditor in May or June 2003. The respective claims for defamation and *iniuria* were not pleaded in the alternative. In respect of each the respondent claimed damages of R50 000.

[4] The Bank relied on the evidence of Mr F J G de Jager who allegedly concluded an oral agreement to open the respondent's current account while he was its manager at Mokopane from 2001 to 2005. De Jager testified concerning the history of his dealings with the respondent and his account. Its only other witness was Ms Carin Cawood, a commercial recovery analyst, employed by the Bank in the recoveries department at Centurion, who produced and spoke to a certificate signed by her in purported compliance with s 15(4) of the Electronic Communications and Transactions Act 25 of 2002.

[5] Mr Venter testified in person and was supported by the evidence of his son, Mr Barend Venter, in regard to the conclusion of the agreement and the transactions on the account. Mr I Z van der Bank gave evidence about the dishonour of the cheque that was the subject of the first and second counterclaims.

[6] The magistrate gave judgment for the Bank in the sum of R34 034,27 plus interest as claimed in the summons. He dismissed the counterclaims with costs. He decided the case on the probabilities as he saw them, finding that the Bank had been entitled to dishonour the cheques because, at the relevant times, there were insufficient funds in the account and no overdraft facilities in place. He reduced the amount claimed by the Bank by R3515,40 because he considered that certain entries in respect of interest had not been proved. He made no explicit findings concerning the credibility of the respective witnesses.

[7] Mr Venter appealed to the full court of the North Gauteng High Court against the orders in respect of the claim and counterclaims. The Bank did not cross appeal.

[8] Ebersohn AJ[1] made the following order:

'1. The appeal succeeds with costs.

2. The order made in the court a quo is set aside and is replaced by the following order:

"1. With regard to the plaintiff's claim against the defendant absolution from the instance is ordered.

2. With regard to the counterclaims judgment is granted in favour of the defendant against the plaintiff in the global amount of R100 000,00 with interest thereon a tempore morae at the rate of 15,5% per annum in terms of the provisions of section 2A (2)(a) of the Prescribed Rate of Interest Act, No. 55 of 1975, calculated from the 23rd November 2004 it being the date of service of the counterclaim on the plaintiff's attorneys, until the date of payment of the R100 000,00.

3. The plaintiff is to pay the defendant's costs and a special order is made in terms of rule 33(8) that such costs must include defendant's counsel's usual fees including counsel's travelling and accommodation expenses, if applicable."'

[9] The principal findings of the court a quo were these:

1. Mr de Jager was 'not a credible witness at all. He blatantly lied at stages and he was evasive and vague on aspects he as bank manager should have been acquainted with'.

2. The Bank did not succeed in proving the correct amount of its claim against Mr Venter either as to capital or interest.

3. The evidence of Ms Cawood was confusing, insufficient to identify Mr Venter's bank account or the entries in it, and did not establish that the bank statements on which the Bank relied had been prepared by any person on its behalf or had been computer-generated as contemplated in the Act.

4. When the cheque that was the subject of counterclaims 1 and 2 was dishonoured there were, by common cause, sufficient funds standing to the credit of Venter to meet the cheque.

5. Mr Venter withstood cross-examination well and his detailed evidence was not shaken. He was 'a solid and truthful witness' and 'clearly credible'. Barend Venter was likewise a clearly credible witness.

6. In para 3 of its particulars of claim the Bank averred that the oral agreement in terms of which the account was opened contained a term that it would have an

1 Vilakazi AJ had died in the interim. The parties agreed to accept the order.

overdraft facility. Venter admitted this in his plea. It was therefore not open to the Bank to contend otherwise even if the evidence established the contrary. The court a quo relied upon *Whittal v Alexandria Municipality* 1966 (4) SA 297 (E); *Van Deventer v De Villiers* 1953 (4) SA 72 at 75-6; *Dinath v Breedt* 1966 (3) SA 712 (T) at 717. It also referred to s 15 of the Civil Proceedings Evidence Act 25 of 1965 which provides:

'It shall not be necessary for any party in any court proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.'

Accordingly, all evidence adduced on behalf of the Bank to the effect that there was no overdraft agreement fell to be disregarded.

[10] For the reasons that follow I am unable to agree with all but the fourth of the preceding conclusions.

[11] The trial commenced in April 2006. All material events had occurred nearly three years and more before that happened. Mr de Jager was woefully ill-prepared, unsure of the facts even where he had been directly involved. One gains the strong impression in reading the record that little, if any, attempt had been made to refresh his memory from contemporaneous documents. Mr Venter and his son, in stark contrast, professed total recall of those matters that suited their case, albeit shorn of corroborative detail and notwithstanding a complete absence of documentary evidence that might have assisted them. Because much of their evidence defies probability, as I shall explain, and because of their strong interest in the outcome of the case, it seems to me that the matter would most prudently be approached on the basis that none of the three witnesses should be preferred to another in the absence of objective corroboration of that witness's version or the preponderance of probability being in favour of that evidence.

The Bank's claim

[12] Proof of Mr Venter's bank statement covering the period from the opening of the account in August 2002 to July 2004 was placed in general dispute by his defence. As was pointed out in *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (SCA) at 524H-525E, a plaintiff relying on an overdrawn bank account is entitled to expect a defendant to place the underlying debits with which he or she

takes issue in dispute. Only to the extent that that is done will the court regard the plaintiff as obliged to prove the discrete details of his claim.

[13] In the present instance the defendant denied the allegations of an agreement 'subject to the normal terms and conditions of the bank' and further denied that interest would be calculated and compounded at a rate of prime plus four per cent, but did not, in his plea or subsequently in his evidence, place in issue any specific entry in the account.

[14] The Bank identified the statements reflecting Mr Venter's account through Mr de Jager who testified that they were sent to the customer monthly and he raised no query. Ms Cawood testified in support of her certificate which certified that

'the attached copies being annexures of statements of account 62044246131 are extracts of data messages made by the plaintiff's company in the ordinary course of business, and are correct.'

Ms Cawood neither handled the account nor captured the data included in the statements. She was not able to give an opinion as to the correctness of the information there contained. I have referred to the criticism directed against her evidence by the court a quo. For the reasons that follow this was not relevant.

[15] Section 15 of the Electronic Communications and Transactions Act provides:

' (1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or

printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.'

[16] In summary, s 15, in the context of Chapter III,

(1) facilitates the use of and reliance on a data message (ss (1) and (2)); *ex parte Rosch* [1998] 1 All SA 319 (W) at 327h-i;

(2) deals with the assessment of the evidential weight of such a message (ss (3)); and

(3) lays down the minimum requirements for admissibility (ss (4)).

Ms Cawood's evidence that the statements in question were 'data messages' was not placed in issue in cross-examination. The certificate complied with the terms of ss (4) and once produced was admissible against Mr Venter and served as 'rebuttable proof' of the facts contained in the printouts of the bank statements. Such proof did not of course extend to the underlying agreement but it was sufficient to establish, prima facie, the state and details of the account and the basis for each credit or debit. No rebuttal was attempted by the defendant.

[17] In assessing the weight to be attached the court a quo over-emphasised ss (3) (a), (b) and (c), overlooking that Ms Cawood was not led on those matters and they were not explored with her in cross-examination in terms that would suggest that there was some deficiency in the records. The court a quo also underplayed the role of ss (3) (d). In relation to the last-mentioned subsection what was relevant was the following:

(1) the bank sent monthly statements detailing the state of the account to Mr Venter;

(2) he, as he conceded, received the statements and perused them carefully; he did not testify that the statements differed in any way from those proved by Ms Cawood nor did he claim that any part was overlooked or unintelligible to him;

(3) each month's statement contained details of all debits and credits including his overdraft limit, bank costs, credit and debit interest rates on balances, VAT, service fees, ATM charges and cash handling and deposit fees;

(4) the defendant did not query any aspect of the account until long after the event,

subject to what I shall have to say below.

[18] All these were relevant factors for the purposes of ss (3)(d). The court a quo found that the reliability of the data was seriously affected by the failure of Mr de Jager to prove the interest rate. It held that 'only the agreed rate may be applied by whomsoever captured the data'. As I have pointed out, however, the statements tend to prove the details of the account kept by the bank and not the underlying agreement behind any particular entry. That is not a question which the Act is designed to solve.

[19] Thus the Bank successfully established the quantum of its claim as it had computed it. What remains for consideration is whether it proved the underlying agreements in relation to the charging of interest and the claims for bank charges, fees etc.

[20] There is a direct conflict of evidence between Mr de Jager and the two Venters as to the Bank's claim for interest at prime plus four per cent. The former said that he made that clear to the defendant at the initiation of the account. Later he testified that when the temporary unsecured overdraft was approved in January 2003 the interest rate would have been prime plus four per cent because 'that was normal when no security was provided'. But he was, in both instances, contradicted by the contemporaneous documentation. From the outset Mr Venter's monthly statements notified him that the bank would charge a far higher rate, and it did so from the time when his account was first overdrawn in November 2002. The rate of interest charged on debit balances was reflected on the respective statements from that month until June 2003 at 26 per cent (ie prime plus 9 per cent), and, from June to August 2003 at 24 per cent (ie prime plus 8.5 per cent). Only in October 2003, after the defendant was, according to De Jager, supported by the records of the Bank, granted a permanent unsecured overdraft facility, did the monthly statements reflect a rate of prime plus four per cent (and continued to do so at all material times thereafter).

[21] Set against these inconsistencies is the evidence for the defendant. Mr Venter testified that during the initial negotiations to open the account:

'Ek het vir Mnr de Jager gevra wat is die rentekoers . . . toe sê hy my "Nou wat wil oom

betaal?", toe sê ek vir hom "Man, waar ek vandaan kom betaal ek altyd prima plus 1.5%.". . . Hy het gesê dit klink heeltemaal reg vir hom so, hy het nie 'n probleem met dit nie.'

This version is highly improbable. First, it presupposes a discretion which Mr de Jager testified that he did not possess in relation to an unsecured overdrawn account. Second, such an insouciant attitude hardly accords with commercial reality: the customer never gets to choose his borrowing rate and the rate suggested did not accord with the bank's practice in such matters. Third, Mr Venter had no claim to preferential treatment nor did he bring assets or prospects which might have seduced Mr de Jager; on the contrary his previous history and an ongoing dispute with ABSA Bank over a million rand overdraft would surely have suggested that he was to some degree a credit risk. Fourth, the monthly accounts that Mr Venter received, perused and understood informed him that he was being charged interest far in excess of the supposedly agreed rate. It is true that he testified that, on repeated occasions, he raised the discrepancy between the rate agreed and the rate reflected on the statements with Mr de Jager. He said that the latter's response was:

'Oom Sieg, moenie bekommerd wees nie, ek sal die regstelling vir jou laat maak, los dit vir my.'

But this evidence is also beyond belief. The manager did nothing to rectify the problem, while the respondent, despite continuing over a long period to receive notice that an excessive rate was being applied to his debit account, did nothing concrete to press his complaint, not even to the extent of recording it in writing before or after the issue of summons. It should be pointed out that Mr de Jager testified that he had no recollection of any complaint being made to him by Mr Venter concerning the interest rate.

[22] On balance I think that the most probable inference to be drawn from this confusion is that, as submitted by the Bank's counsel, no express agreement as to the rate was arrived at before October 2003. The defendant, no stranger to the banker/client relationship, well-knowing that the Bank would charge costs and fees and levy interest on his overdrawn account in accordance with its usual practice, was content to submit himself to that practice provided only that the rates and charges were reasonable. That is in fact what happened over the duration of the relationship. Neither while the account was in operation nor during his evidence did Mr Venter suggest that such rates and charges were other than reasonable. On that basis the Bank's statements reflect the tacit agreement of the parties as to the foundations of the

account and the amount of the Bank's claim did not require adjustment by the magistrate. However, as I have pointed out, the Bank did not challenge the reduction effected by the magistrate and we are limited in setting aside the judgment of the court a quo in relation to the claim in convention, to restoring the order made at first instance.

The counterclaims

[23] The respondent's case, in relation to which he bore the onus, was that when the Bank dishonoured each of the three cheques, his account held sufficient funds to meet that cheque, either because it was in credit or because an overdraft facility had been agreed to an extent sufficient to justify payment by the Bank.

[24] None of the three cheques was produced at the trial. It appeared to be common cause that each had been endorsed 'refer to drawer' but no evidence was led to explain that endorsement. This was a matter within the knowledge of the Bank. It had pleaded in relation to each cheque that there were insufficient funds to meet it and one must therefore assume against the Bank that it purported to act on that understanding in dishonouring the cheques.

[25] The non-production of the cheques also meant that the trial court had no reliable indication of when each was drawn in relation to the date of its dishonour. (I assume that the last-mentioned date was the date of the appropriate debit on the bank statement, but here too there was no evidence to explain the sequence of events.) This might have been of importance in relation to the first cheque presented and dishonoured on 25 March 2003 since this appears to have been the first of three cheques presented on that day in amounts of R10 000, R27 000 and R7720 respectively. The last two were honoured by the bank despite the balance on the account being reduced thereby to a debit of R11 984,18. The case was fought upon the terms of the Bank's plea that there were indeed insufficient funds available to meet the first cheque but Mr de Jager and the defendant agreed in evidence that sufficient funds were in fact available. For reasons which will be explained, this confusion does not affect the result.

[26] It was submitted on behalf of Mr Venter that the Bank had admitted in its

particulars of claim that the current account was approved ‘with an overdraft facility’. Therefore, so the argument proceeded, it was not open to the Bank to deny the existence of a facility at the dates of presentation of any of the dishonoured cheques, as it had in its pleas to the counterclaims and through the evidence of Mr de Jager.

[27] If a strict, technical approach is adopted the allegations in the particulars of claim and the admission of those allegations in Mr Venter’s plea are irrelevant. The reason is that on this aspect of the case we are concerned with Mr Venter’s claim in reconvention and not with the claim made by the Bank against Mr Venter. As pointed out in Harms, *Civil Procedure in the Supreme Court* (loose leaf) para B24.1, p B-171 (Issue 40) ‘a claim in reconvention is a convenient surrogate for an independent action’. The main object of permitting a defendant in an action to raise a claim in reconvention is to secure that both claims are adjudicated upon simultaneously and judgment entered in accordance with the balance that results from the adjudication. Nicholas J in *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W) at 1337D-F, correctly stated the position in the following terms:

‘Where, as in the present case, the claim in reconvention is entirely separate and distinct from the claim in convention, there are really two actions, the main action and a cross-action ... To a certain extent, it is true, the pleadings run a parallel course – plea and claim in reconvention; replication and plea in reconvention; as a general rule claim and counterclaim will be adjudicated together ... and the Court may in its discretion make a single order to both claim and counterclaim. But the fact remains that the two actions are separate and distinct.’

[28] It follows from this elementary principle that any admission embodied in the pleadings in relation to the claim in convention is only relevant in relation to the claim in reconvention if and to the extent that the admission is incorporated into the pleadings in relation to the claim in reconvention. That did not occur in the present case. Where s 15 of the Civil Proceedings Evidence Act refers to a ‘fact admitted on the record of such proceedings’ it should in my view be interpreted in a sense consistent with the principle I have stated. Mr Venter pleaded that the Bank was obliged to meet all cheques drawn on his account, either on the basis of his alleged general overdraft facility or on the basis of a special arrangement in relation to these three particular cheques. The Bank,

in its plea to these allegations, pleaded specifically in relation to all three cheques that at the time each was presented for payment Mr Venter did not have sufficient funds in his account and no arrangements for an overdraft facility had been made that would have obliged it to pay the cheque. On the pleadings in respect of the claim in reconvention there was accordingly no admission as contended for on behalf of Mr Venter. The case was conducted on the basis that the existence of adequate funds or an overdraft facility at the time these three cheques were presented for payment was in dispute between the parties.

[29] This approach to questions of pleadings may seem technical, although it is no more technical than the approach adopted in order to achieve substantial justice in the case of *Dinath v Breedt*, supra, relied on by the court a quo, but it would be an extraordinary result were Mr Venter able to rely upon an admission contained in the pleadings between him and the Bank in relation to the Bank's claim to recover the balance owing on the overdraft, whilst ignoring the pleadings in the claim in reconvention, where he advanced his claims of iniuria and defamation, where the facts were expressly put in issue. If a court is to adopt a less technical approach then it must at least have regard to all the pleadings in the action, that is, both those in relation to the claim in convention and those in relation to the claim in reconvention. If that is done, and the pleadings are construed as a whole, there was no admission that at the time the three cheques were presented for payment Mr Venter had either a general overdraft facility or a special arrangement for overdraft facilities that would have entitled him to require the Bank to honour these cheques. The Bank expressly denied the existence of any such overdraft facilities or any such arrangement. The statement in the particulars of claim that Mr Venter was accorded a current account 'met 'n oortrokke fasilitiet' must be construed in the light of the express denials that such facility existed and was available to him at the time the three cheques were presented for payment. Litigants cannot pick and choose those portions of the pleadings that suit them whilst disregarding those portions that are against them.

[30] It is salutary in this regard to remember what Innes CJ said in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198:

'The object of pleading is to define the issue; and parties will be kept strictly to their pleas

where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings.'

It is for that reason that courts have always held themselves entitled to determine an issue, even though not raised on the pleadings, where that issue has been fully canvassed at the trial and both parties have had every facility to place all the facts before the trial court. See *Shill v Milner* 1937 AD 101 at 105. Were one to ask in this case, as De Villiers JA did in *Shill v Milner*, what the substantial issue was between the parties in the court below, there could be only one answer. It is that the issue was whether Mr Venter had access to appropriate overdraft facilities at the time that each of the three cheques was dishonoured. That being so, there is no reason to give to the pleadings a strained and unnecessary meaning inconsistent with the understanding of the parties and the basis upon which this litigation was conducted. Properly construed the statement in the particulars of claim meant nothing more than that at a stage of the relationship between the Bank and Mr Venter the latter was allowed overdraft facilities and those overdraft facilities gave rise to the claim eventually made by the Bank against Mr Venter. That approach not only accords with reality, but is consistent with the benevolent approach that courts normally adopt towards pleadings in the magistrates court.

[31] It is unnecessary, in the light of those conclusions, to consider the effect of the decision in this court in *Rance v Union Mercantile Co Ltd* 1922 AD 312 at 315; or whether as Greenberg J suggested in *Canaric NO v Shevil's Garage* 1932 TPD 196 at 199[2] 'the Court may disregard an admission made in the pleadings, where it is clear after a full investigation that this admission is contrary to the facts and where injustice would result from an adherence to the admission'. Those issues do not arise in the present case because, for the reasons I have given, no such admission as contended for by Mr Venter is contained in the pleadings.

[32] I turn then to the facts. The bank records show that the monthly statements reflected a nil overdraft from the initiation of the account – an assertion that Mr Venter did not challenge or query. Only in January 2003 did he furnish a balance sheet to

2 And Van den Heever AJ so held in *Fourie v Sentrasure Bpk* 1997 (4) SA 950 (NC) at 970B.

enable the

bank to assess his financial stability and even then he provided no security for the advance of funds. After providing the balance sheet his account was allowed to run into debit. De Jager had no authority to approve an unsecured overdraft to new clients on a permanent basis. In the period February to May, according to his own admission, Mr Venter frequently sought Mr de Jager's verbal approval for the issue of cheques. According to him there had been a standing facility in place with a limit of R30 000 since August. Plainly it should have been unnecessary to ask for approval unless there was a danger of that limit being exceeded. Yet Mr Venter did so. All things considered the probabilities lean strongly against existence of a permanent facility and, with one reservation (referred to in para 32 below) in favour of Mr de Jager's version that whatever leeway was afforded to Mr Venter was dealt with first on the basis of a globular limit of R30 000 until the end of March and thereafter on a case by case basis.

[33] There is a further item of documentary evidence that merits reference although it was not referred to by the witnesses or the parties' counsel. It is Exh A3 p 64 and forms part of a bundle of apparently contemporaneous bank records. It is headed "Excess Report – Agricultural Segment' and dated 4 March 2003. It plainly relates to an application by Mr Venter for an extension of his overdraft facility. The relevant extracts are these:

'REASON FOR EXCESS: Temporary facility expired R30 000 expected on 28/02/2003

SOURCE & TIMING OF ADJUSTMENT: Customer still busy with the harvesting of maize, will only commence on 05/03/2003 as the maize was still too wet.

. . .

BRANCH MANAGER'S RECOMMENDATIONS:

Kindly extend facility of R20 000 till end March.'

[34] There is no document that suggests a further approved extension after the end of March 2003. The significance of this evidence is that:

1. It confirms Mr de Jager's evidence of the approval of a temporary facility of R30 000 for the latter part of January and the whole of February 2003.
2. It tends to show that the facility was extended by Mr de Jager at the customer's request until the end of March at a lower limit of R20 000.
3. It renders improbable Mr Venter's evidence that a permanent facility of R35 000

agreed in August 2002 ‘for the season’ ie 12 months, remained in operation during the whole of this period (and subsequently).

4. The absence of an extension into April and May tends to support Mr de Jager’s evidence that when, during those months, the customer expected to issue a cheque that might result in an excess he asked for (and was granted) special approval to meet the amount or occasion of the payment.

[35] I accordingly think that the Bank’s version that Mr Venter was not afforded a general overdraft facility is more probable than his claim to have been granted such a facility. The onus accordingly rested on him to prove in relation to each of the dishonoured cheques, that he obtained approval in advance for the issue of the particular cheque. Should he not have discharged this burden the trial court ought to have concluded that the Bank was entitled to refuse to pay the cheque because of an absence of funds.

[36] In the light of this conclusion the circumstances prevailing at the time of the presentation of each dishonoured require consideration.

The first cheque

[37] I am prepared to assume in favour of Mr Venter that when this cheque was presented sufficient funds were available to meet it or, if that was not the case, that he had made special arrangements for the bank to honour it. As to what happened thereafter the evidence of Mr Venter and his son is supported by that of the creditor, Mr van der Bank, an apparently impartial witness. The last-mentioned had received the cheque in payment for work being carried out on the defendant’s farm. He deposited it. While present in the defendant’s home the latter received a telephone call. He informed Mr van der Bank that the bank had phoned to apologise for its error in stopping the cheque. The bank had assured him that he could forthwith issue a replacement cheque for the same amount which would be met. While this was happening the payee’s mother phoned to tell him that the cheque had been dishonoured. Mr van der Bank accepted the replacement cheque, deposited it and was paid. He testified that the incident did not affect his regard for Mr Venter or lead him to doubt his creditworthiness.

[38] This evidence establishes that, in accepting sole fault for the non-payment of the cheque before Mr Venter or his payee was aware of its dishonour, the bank rebutted any presumption of a*nimus iniuriandi* arising from its unwarranted action. Moreover it enabled Mr Venter to redress the position at the earliest possible opportunity with no blame whatsoever attaching to himself. His creditor did not regard the dishonour as a slur upon him and in so far as Mr Venter testified that he felt humiliated and embarrassed, his reaction, if not exaggerated, was unreasonable in the circumstances. This claim was belied by the fact that he made no complaint to the Bank at the time or until it sued him. In my view the trial court should have concluded that Mr Venter had not proved that he suffered any inuria (actionable harm) in consequence of the dishonour. The first and second counterclaims should have failed for these reasons.

The second cheque

[39] Mr Venter's evidence was that he obtained express approval to overdraw his account in advance of the issue of this cheque from Mr de Jager. The latter denied that. No probabilities favour Mr Venter's version. On the contrary, for the reasons I have already advanced, he must be disbelieved on the aspect of a prevailing permanent facility. It also seems most unlikely that Mr de Jager, having been obliged to apologise shortly before for the unjustified dishonour of a cheque, would have allowed that to happen a second time despite having given an express undertaking to meet the second cheque. Remarkably Mr Venter, insulted and humiliated as he claims to have been, took no steps to complain or obtain redress until sued by the bank more than a year later. In the circumstances I am satisfied that he failed to discharge the onus of proof in relation to the third and fourth counterclaims because the trial court must have been left in serious doubt about the wrongfulness of the bank's action in dishonouring the cheque.

The third cheque

[40] Much the same considerations apply to the dishonour of this cheque. The unlikelihood of Mr Venter's quiescent response is emphasised by the fact that it would have been the bank's third default and the second within a short time period in relation to the same creditor, Novon Janwurm. Further material facts are these: the account had reflected a steadily growing debit balance from 10 April and by 14 April stood R22 280

in the red. Mr de Jager denied that he had been asked or had agreed to meet the cheque. Mr Venter drew no cheques after that date. The cheque in question (number 59) would probably have been drawn towards the end of March (since numbers 58 and 60, 61, 62, 63, 65, 66 and 67 are recorded as having been met in the last week of March and the first week of April). Cheque number 59 for R30 000 was dishonoured on 23 May and would have increased the debit balance to R52 907,12 if paid. After its dishonour, Mr Venter did nothing to reduce the debt to the bank and did not issue a replacement cheque to the creditor. Only in October 2003, without intervening operation of the account, was a permanent overdraft facility of R35 000 extended to him for a period of one year. In all these circumstances I can find no reason why the trial court should have favoured Mr Venter's version above that of Mr de Jager. The fifth and sixth counterclaims also fell short of the mark and should have been dismissed.

[41] The magistrate's approach to the counterclaims was correct and the appeal to the high court should not have succeeded.

[42] In the result the following order is made:

1. The appeal by the Bank in relation to the claim and counterclaims is upheld with costs.

2. The order of the court a quo is set aside and in its place the following order is made:

'The appeal is dismissed with costs.'

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

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